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Filed April 30, 1902.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

ROBERT E. DOWNS,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

No. 666

PETITION OF ROBERT E. DOWNS, AND BRIEF THEREON, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ERNEST A. BIGELOW,
Attorney for Petitioner.

IN THE

Supreme Court of the United States,

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ROBERT E. DOWNS,
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No.

PETITION OF ROBERT E. DOWNS AND BRIEF THEREON, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner respectfully prays the Court to grant the writ herein, in order to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit, upon grave and important questions as to the construction of Section five of the Tariff Act now in force and its application to imports of sugar manufactured in Russia,

The question which the Court is asked to determine is, Does the Russian Government pay or bestow, directly or indirectly, any bounty or grant upon the exportation of sugar, within the meaning and scope of Section five of the Tariff Act of July 24, 1897, imposing a countervailing duty equal to the amount of any bounty or grant so paid or bestowed ?

STATEMENT.

Section five of the Tariff Act of July 24, 1897, provides in part as follows; "That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States * * * * * * there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

In 1898 the Secretary of the Treasury decided that a certain transaction between citizens, sanctioned by the Russian law, constituted the payment of a bounty, and on December 12th (T. D. 20407), he proclaimed the net amount thereof in accordance with the provisions of Section five above. Subsequently, on April 20, 1900 (Circular No. 50), pending certain treaty negotiations with Russia, this order was suspended; but the suspension was revoked February 14, 1901 (Circular No. 110).

The Russian Government protested that no bounty was paid on the export of Russian sugar and that the imposition of the countervailing duty was a discrimination against Russian commerce in violation of treaty rights. On this ground the Russian Minister of Finance, two weeks after the revocation of the suspension of the order imposing the countervailing duty, withdrew from American imports into Russia the privilege of the conventional tariff of that country to which the United States was entitled under the "most favored nation" clause of the treaty with Russia of 1832, and imposed thereon the maximum tariff, thereby destroying the larger part of our rapidly growing export trade with Russia, amounting to millions of dollars annually, and rendering the question in this case of prime importance to American manufacturers.

Prior to the suspension of the order this petitioner imported certain Russian sugars, upon which the Collector of the port of Baltimore imposed an additional or countervailing duty equal to the amount of the alleged bounty as proclaimed by the Secretary of the Treasury. The petitioner paid this duty under protest, and appealed to the Board of United States General Appraisers (by authority of Section 14, Administrative Customs Act, June 10, 1890), alleging that the Russian Government did not pay or bestow a bounty or grant on the exportation of this sugar, within the meaning of Section Five of the Tariff Act of 1897.

The Board of Classification of the United States General Appraisers overruled the protest, two of the three members deciding that "A bounty or grant "within the meaning of Section five of our Tariff Act "has been paid upon the exportation of this sugar, so

" as to work a benefit or advantage to the Russian " sugar exporter, as follows:

" FIRST.—Upon the exportation of the sugar, " the Government remitted or refunded the ex- " cise tax thereon, or otherwise canceled the " indebtedness of the sugar manufacturer, so that " he was enabled to place his product upon the " market free from the burden of either the reg- " ular or additional excise tax; and

" SECOND.—The certificate which the Govern- " ment issued to him upon the exportation of his " sugar had a substantial market value, and was " transferable, and operated as a premium, grant, " bonus or reward."

The third member of the Board dissented on the grounds:

" FIRST.—That the remission, on exportation of " sugar, of the excise tax, does not constitute a " bounty or grant upon the exportation."

" SECOND.—That a bounty or grant need not be " money, but may consist of a valuable right, *con-* " *ditioned, however, upon exportation*, in order to be " within the purview of Section Five, Act of " July 24, 1897."

" THIRD.—That Russia does apparently confer " a valuable right or privilege in her domestic " markets upon her manufacturers of sugar, *but* " *this right is not conditional upon exportation.*

" FOURTH.—The question being in doubt, the " doubt should be resolved in favor of the im- " porter."

On appeal to the United States Circuit Court for the District of Maryland, Judge Morris affirmed the decision of the majority of the Board, but expressly on the ground that to do otherwise would require a carefully considered written opinion, and that delay would prevent this important case from being heard at the November Term of the Circuit Court of Appeals. The learned Judge then goes on to say: " I

"am free to say that the question appears to me a "very close one, and that I incline to the views ex- "pressed in the dissenting opinion of General Ap- "praiser Tichenor."

The Circuit Court of Appeals affirmed the decision of the courts below, the Court saying: "We find "that the Russian exporter of sugar obtains from his "Government a certificate, solely because of such ex- "portation, which is worth in the open markets of "that country from R. 1.25 to R. 1.65 per pood, or "from $1\frac{8}{10}$ to $2\frac{35}{100}$ cents per pound; therefore we "hold that the Government of Russia does secure to "the exporter of that country, as the inevitable "result of its action, a money reward or gratuity "whenever he exports sugar from Russia." The learned Court further says: "In affirming the decree "of the Court below we also affirm the judgment "rendered by the Board of General Appraisers, "whose opinion so fully expresses our views and so "ably presents the facts involved herein and the law "applicable thereto, that we deem it entirely appro- "priate to adopt the same as part of the opinion of "this Court."

The grounds of the decision of the Circuit Court of Appeals, therefore, are two-fold:

FIRST.—That the remission of the excise tax, upon the exportation of the sugar, was a bounty or grant within the scope of Section five.

SECOND.—That the issuance to the exporter of a certificate which had a substantial market value operated as a bounty or grant upon exportation.

IT IS RESPECTFULLY SUBMITTED THAT THE CIRCUIT COURT OF APPEALS ERRED IN BOTH THESE CONCLUSIONS.

ARGUMENT

As to the First Proposition of the Circuit Court of Appeals.

I.

To include the remission of excise taxes, *i. e.*, drawbacks, within the scope of bounties or grants as the terms are used in Section five, would be to attribute to Congress an intention to condemn as bounty-paying an important integral part of the revenue system of the United States. Since 1794 the United States has had a system of drawbacks which has been so elaborated that annually millions of dollars in internal revenue taxes and customs dues are refunded to exporters.

Section 15 of this very Act of July 24, 1897, provides "that all articles manufactured in whole or in "part of imported materials, or of materials subject "to internal revenue tax and intended for exporta- "tion without being charged with duty and without "having an internal revenue stamp affixed thereto "shall be manufactured in bonded warehouses and "when exported directly therefrom shall be exempt "from duty and from the requirements relating to "revenue stamps."

Section 30 of the same act provides that "when "imported materials on which duties have been paid "are used in the manufacture of articles manufactured "or produced in the United States, there shall be "allowed on the exportation of such articles a draw- "back equal in amount to the duties paid on the ma- "terials used, less one per centum of such duties."

Section 3329 of the Revised Statutes provides that "Distilled spirits upon which all taxes have been paid, "may be exported, with the privilege of drawback."

If the learned Court below was right in spelling out a bounty from the fact that "upon the exportation of "the sugar the Government remitted or otherwise "canceled the indebtedness of the sugar manufac- "turer, so that he was enabled to place his product "upon the market free from the burden of either the "regular or additional excise tax," then the United States Government pays a bounty upon the exportation of distilled spirits and of "all articles manufac- "tured in whole or in part of imported materials, or "of materials subject to internal revenue tax," for the manufacturer thereof is equally with the Russian sugar manufacturer "enabled to place his product "upon the market free from the burden of the excise "tax."

Congress could not have intended the words "bounty or grant" as used in Section five to have any such comprehensive scope.

II.

The bounties contemplated by Congress were such artificial aids as tend to lower the natural cost of foreign production, thereby neutralizing the effect of the protective duties estimated with reference to that natural cost.

A drawback does not tend to lower the natural cost of production. To quote an old authority: "A "drawback is a device resorted to for enabling a "commodity affected by taxes to be exported and "sold in the foreign market on the same terms as if "it had not been taxed at all. It differs in this from "a bounty, that the latter enables a commodity to "be sold abroad for less than its natural cost; "whereas, a drawback enables it to be sold exactly "at its natural cost. Drawbacks do not occasion

" the exportation of a greater quantity of goods than " would have been exported had no duty been im- " posed." Cited in part by Mr. Chief Justice Fuller, in the Passavant Case (169 U. S., at 23).

III.

To maintain that a drawback is a bounty is equivalent to saying that an omission to tax is a bounty. The fact that exported goods are free from tax does not make them bounty-fed *as regards the foreign market.*

AS TO THE SECOND PROPOSITION OF THE CIRCUIT COURT OF APPEALS.

The second ground upon which the Circuit Court of Appeals rested its decision is that the Russian exporter obtains from his government, solely because of such exportation, a certificate which has a substantial market value; and the Court holds "that the " Government of Russia does secure to the exporter " of that country, as the inevitable result of its action, " a money reward or gratuity whenever he exports " sugar from Russia."

It is submitted respectfully and with the utmost deference that the opinion of the learned Court states only half the truth. It is true that the exporter, as stated by the Court, " receives a money reward or " gratuity whenever he exports sugar from Russia." It is equally true, however, that he receives the same money reward or gratuity when he does *not* export his sugar, but sells it on the home market. In other words the " money reward or gratuity," if it be a bounty at all, is not conditioned on exportation, and hence is not within the purview of Section five.

I.

The Russian Sugar Law.

The Russian Sugar Law is the result of the Government's determination to take the control of the trade out of the hands of the Sugar Ring. The outlines of the system are briefly as follows: (1) To insure revenue to the Government all sugar produced is subject to a tax of R. 1.75 per pood; (2) to insure a fair price to the consumer a maximum price is fixed by the Ministry, a large "indivestible reserve" of sugar being kept on hand to be thrown on the market if the maximum be exceeded; (3) to insure a fair price to the manufacturer a high customs duty is imposed on foreign sugar; (4) to protect all concerned from the evils of overproduction a complicated system is enforced, the provisions of which have caused most of the confusion of mind on this subject.

To prevent overproduction the Government *penalizes* all sugar over and above the amount estimated to be required for consumption. That is to say, the sugar estimated to be required for consumption ("Free sugar") is subject to the normal excise tax; the surplus sugar above that estimated amount ("surplus," "free surplus" or "free reserve") is not allowed to be sold in the home market except upon payment of a double excise tax.

To give effect to this plan, the Ministry estimate the total national production and the total consumption, and the product of each factory, whether at the profitable Moscow market far inland, or at a lit-

tle seaport town, is divided into "free" and "surplus" sugar according to this estimate. Thus, if the Ministry estimate the total consumption at 35 million poods and total production at 50 millions, $\frac{35}{50}$ of each individual's production will be "free sugar" and $\frac{15}{50}$ (less a certain portion set aside as "indivertible reserve") will be "surplus sugar" (Law, § 3 *et seq.*, Rec., p. 41; Consul's Report, Rec., p. 60).

It is this impartial distribution of "free sugar" between those who have a good market, but far inland, and those who have only a fair market, but near a seaport, which occasions the traffic in export certificates.

For example, a manufacturer located at Moscow or other great inland city where the demand for sugar ensures maximum price, has, say, 350,000 poods of "free sugar" and 150,000 poods of "surplus." He can carry this "surplus" over to the production account of the following year (Reg., § 19, Rec., p. 50), or he can export it, but in the latter event he must pay freight to the coast. As the home market is highly profitable, his endeavor is to convert his "surplus sugar" into "free sugar" which he can sell at the normal tax. On the other hand, another factory situated near a shipping port, to which the freight is cheaper and with the demand not great, finds it more profitable to export its entire output, "free" as well as "surplus" (Rec., p. 17).

Inasmuch as the total "free sugar" for the home market is definitely fixed at the amount estimated for consumption (Rec., p. 8), the "free sugar" quota of the Moscow manufacturer can be increased only at the expense of the quota of some one else, *e. g.*, the seaport manufacturer, and the incentive to the mutual transaction is precisely this fact, that he at Moscow

can sell to greater and export to less advantage than he at the seaport.

There are two ways by which the Moscow manufacturer can increase his quota of "free sugar" at the expense of the seaport merchant.

a. The first method is by direct transfer. Section 39 of the regulations (Rec., p. 57) allows one manufacturer to cede to another his right to place on the home market free, *i. e.*, without the payment of the additional tax, his allotted quota of "free sugar." Section 40 prescribes the method whereby the free sugar quota of the transferee is increased as the quota of the transferror is diminished in the books of the respective mills. *Note that here is no export by either party, nor actual transfer.* The sole change appears on the books of the mills, where one man's product has become all "free sugar," and the other man's product, to the same amount, has become "surplus sugar," which he can only place on the market by paying the additional tax, or carry over to the next season, or export. The consideration for the transfer is best stated in the words of the American Consul (Rec., p. 17): "As the first and second "methods of disposing of his sugar (by paying "double tax or exporting) are less advantageous "than placing the article on the home market as free sugar, the manufacturer who ceded the right receives from the manufacturer who acquired the "right the price per pood agreed upon between "them, which is usually determined by the difference "existing at the moment between the price obtain-"able for the sugar on the home market and the "price obtainable by sale abroad."

b. The second method is by the purchase of an

export certificate certifying to the export of a certain quantity of "free sugar."

When "surplus" sugar goes from the mill for export, security must be given for the payment of the additional excise tax, and this security is not released until the return of the Custom House certificate of export (Rec., p. 55).

To avoid giving this security and in general for the greater freedom in business transactions, the manufacturer is granted the right to export "free sugar" in lieu of "surplus sugar," and upon the return of the "free sugar" export certificate the local excise inspector transfers to "free sugar" account an equal quantity of "surplus" (Rec., pp. 16, 55). The result is the same as though the manufacturer had exported "surplus sugar" and left his "free sugar" undisturbed; but he has benefited by not having to tie up a large amount of securities pending the return of the Custom House certificate.

It being immaterial to the Government how the manufacturers redistribute the "free sugar" among themselves, the "free sugar" certificate of export is made transferable, *and any holder thereof is enabled to have transferred from his "surplus" to his "free" account an amount of sugar equal to the "free sugar" shown thereby to have been exported* (Stipulation No. 8, Rec., p. 10).

As in the case of the direct transfer, it is the Moscow manufacturer who purchases these export certificates from the seaport merchant who has found it "more profitable to export his entire output" (Rec., p. 17). The right acquired being the same in both cases, viz., to enlarge, at the expense of another, the right of issue into the profitable home market, it is logical that the consideration for the direct transfer and the

export certificate should be the same, viz., the difference existing at the time between the price obtainable for the sugar in the home market and the price obtainable abroad (Stipulation No. 7, Rec., p. 9).

To recapitulate: The right of issue into the home market is a valuable right, because large profits therein are ensured by the operation of a high protective tariff. This right is limited to a portion of the product, estimated to equal the total consumption in the Empire, and all manufacturers participate equally therein. Trade conditions and geographical situation render this right more valuable to some than to others; accordingly, the Government allows one manufacturer to increase his proper share by private negotiations with other manufacturers. He may either arrange a direct transfer whereby his share of the right is increased by as much as his assignor's right is diminished; or he may purchase the export certificate of some merchant who has found it more profitable to forego this right and export his product. In both cases the purchase price is the same, viz.: the difference existing at the moment between the domestic market price and the foreign price, *i. e.*, an amount equivalent to the prospective profits on the home market, as modified by the freight which the purchaser would have to pay to send his product to the seaport.

It is the purchase price paid for the export certificate which the Circuit Court of Appeals held in the present case to constitute a bounty or grant on exportation.

II.

MORE PARTICULARLY AS TO THE NATURE OF THE EXPORT CERTIFICATE.

The value of the certificate lies not in the fact of exportation, *per se*, but in the fact that the exporter has thereby foregone his right to share in the profits on the home market, and the purchaser acquires the right. The total "free sugar" of the empire has been depleted by the export and the holder of the certificate has the right to make good the depletion, increasing thereby his quota of "free sugar," which he can sell to great advantage on the profitable home market. Total exports have not been increased, nor total sales on the home market. The only change is that the rights already shared by the two manufacturers have been redistributed in new proportions.

If the export of a certain amount of sugar was the foundation of the value of the certificate, then the export of "surplus sugar" should give value to a certificate thereof. Such, however, is not the case. A certificate certifying to the export of "surplus sugar" has no value at all, except as a voucher for the return of the additional tax remitted on export. As the American Consul says (Rec., p. 16): "The "manufacturer presents this certificate to the local "excise administration, which sets the securities free "which were deposited when the sugar was removed "from the factory." This is its only value, the reason being, of course, that the export of "surplus sugar" does not deplete the total "free sugar" in the Empire, and hence the holder of the certificate thereof

has no right to increase his allowance of "free sugar."

Again, if export be the foundation of the value of the certificate, why should direct transfers, involving no export at all, have precisely the same value, viz., the equivalent of the profits which the holder will reap by selling that amount of "free sugar" on the profitable home market?

III.

THE PURCHASE PRICE OF THE EXPORT CERTIFICATE IS NOT A BOUNTY OR GRANT "ON EXPORTATION."

It is the fact, and it is so stipulated in this case (Stip. No. 7, Rec., p. 9), that the price of the certificate "is usually determined by the difference existing at the time between the price obtainable for "the sugar in the home market and the price obtainable abroad."

Thus, if a manufacturer sells his free sugar at home he receives the home market price, which is a large one, owing to the high tariff; if he exports his free sugar to a foreign market he obtains the foreign price plus the sum derived from the sale of his export certificate.

As the price of the export certificate is the difference between the price obtainable at home and the price obtainable abroad, it is obvious that the manufacturer *receives the same gross amount* for his "free sugar" whether he exports or does not export.

In other words, the price of the export certificate is a substitute for, and equivalent to, the large profits on the protected and highly profitable home market which the manufacturer, by selling his "free sugar"

in the less profitable foreign market, foregoes in favor of another. Had he sold his "free sugar" in the home market, he would have received the large home market price; by exporting he transfers to another the right to receive that price and the purchase price of his export certificate, plus the price he receives for his sugar in the foreign market, exactly compensates him therefor.

How, then, can that be called a bounty on exportation which does not depend on exportation, and which is received by the manufacturer, whether he exports or does not export.

It is true that the export certificate, *qua* certificate, is conditioned an exportation; but the bounty must be sought, not in the certificate itself, but in the value received therefor. As shown above, the value received by the exporter is no greater and no less than he would have received, though in a different form, had he not exported at all but sold in the home market.

To state the proposition in another way, this right of issue into the home market, which is represented by the export certificate, was vested in the original owner regardless of any export, *for the Russian law does not require the exportation of any portion of the product as a condition of selling the balance in the home market.* As the original right to participate in the home profits was not conditional on exportation and hence not a "bounty on exportation," it follows that the purchase price of the right, the equivalent thereof, cannot be deemed a bounty on export. Mere transfer of the right cannot convert that into a bounty on export which was not one before.

IV.

THE BOUNTY OR GRANT MUST BE CONDITIONED ON EXPORTATION TO BE WITHIN THE SCOPE OF SECTION FIVE.

It is not enough that the bounty is on production and hence incidentally on exportation. The bounty must be solely on exportation and conditioned thereon in such fashion that the exporter gets it and the non-exporter does not.

The section is explicit: "any bounty or grant *upon the exportation.*" The prototype of this section was Section 182½ of the Tariff Act of 1894, which was equally explicit that an additional duty should be levied on all sugars imported from any country "which *at the time the same are exported therefrom* "pays directly or indirectly a bounty *on the export* "thereof."

Expressio unius exclusio alterius est.

V.

THE PURCHASE PRICE OF THE EXPORT CERTIFICATE WOULD NOT COME WITHIN THE PURVIEW OF SECTION FIVE EVEN IF THE SECTION WERE NOT LIMITED TO BOUNTIES CONDITIONED ON EXPORTATION.

The certificate represents the right of issue into the home market, and this right is valuable only because of the large profits to be reaped therein. If the purchase price of the certificate be a bounty, so also must be the profits of which it is the equivalent. These profits, however, are due to the operation of the high protective tariff, enhanced by the further

limitation of the market to a portion of the product. In its final analysis the Russian system is only an extension of the American protective tariff system.

There is an exact analogy, for instance, between the position of Russian sugar manufacturers and that of American distillers. Both are ensured a profitable home market by the tariff; both are subject to heavy excise taxes which are remitted on export; and as, to quote a famous authority, "the tariff is the mother of trusts," a combination of manufacturers secures by agreement in the United States that further limitation of the supply for home consumption which in Russia is provided for by law. If the profits of the American distiller do not constitute a bounty, then no more do the profits of the Russian sugar manufacturer.

The learned counsel for the Government will undoubtedly claim that the analogy between Russian sugar and American distilled spirits is defective in that there is no statutory restriction placed upon the amount of spirits which may be placed upon the American market. In reply to this contention it is submitted that there is no distinction in principle between limiting a market to home producers by a protective duty, and further limiting that market to a certain portion of the product by statute. The limitation enhances the price of the article in both instances and the Russian system differs from the American only in degree, not in principle.

We may admit, with Alexander Hamilton, that "duties of this nature evidently amount to a virtual "bounty on the domestic fabric, since by enhancing "the charges on foreign articles, they enable the "national manufacturers to undersell their foreign "competitors." We may acquiesce in the finding

of the famous Brussels Sugar conference, just adjourned, that a high protective duty (surtax) is an indirect bounty.

The question here, however, is not whether protective tariffs are indirect bounties, but whether Congress *intended to include them within the scope of Section five.*

It will hardly be claimed that Congress intended to condemn as bounty-paying in one section of an Act the very system established with such infinite detail by the rest of the same Act.

An examination of the wording of the section moreover, excludes such a theory. The section does not mention indirect bounties; it applies only when a country shall "*pay or bestow directly or indirectly* a bounty." There is a vast difference between paying an *indirect* bounty and *indirectly paying* a bounty. A protective tariff is an *indirect bounty.* The indirect *payment* of a bounty is illustrated by the Netherlands sugar law, whereby all producers are credited with a direct bounty and then charged with a larger excise tax which is remitted on export, the result being that only those who export get any bounty. Such a system was held to come within the prohibition of Section five in the Hills Bros. case (107 Fed., 107).

CONCLUSION.

The question in this case is of vast importance to American manufacturers. If the Circuit Court of Appeals is in error in deciding that Russia pays a bounty on the exportation of sugar, the countervailing duty must be taken off, and this will re-establish with Russia the friendly trade relations which formerly obtained.

The decision of the Circuit Court of Appeals that drawbacks are bounties within the meaning of Section five vitally affects the revenue system of the United States and concerns also the trade relations of the United States with foreign countries, and this not only as regards sugar, but also all products which are subject to internal revenue tax, for practically all countries remit such taxes upon exportation.

The Circuit Court of Appeals has in effect decided that the profits secured to domestic manufacturers by the operation of a protective tariff constitute bounties or grants on exportation within the scope of Section five. Under such a ruling most American products are bounty-fed.

There being a similar case pending in the Circuit Court for the Second Circuit, a review of this case by the Supreme Court will ensure uniformity of decision.

Wherefore, your petitioner prays that a writ of *certiorari* may issue herein to the Circuit Court of Appeals for the Fourth Circuit, directing that this cause be certified to this the Supreme Court of the United States for its review and determination.

Dated April 18, 1902.

ERNEST A. BIGELOW,
Attorney for Petitioner.

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